IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.735 OF 1998

1. Pandit Jaywant Pawar, aged about 57 years, Occu.: Government Service.
2. Smt. Krushnabai Jaywant Pawar, aged about 70 years, Occu.: Household, Both residing at Pawar Mala, Panchavati, Nasik. ... Appellants

Versus

State of Maharashtra (At the instance of Panchavati Police Station, Nasik, vide C.R. No.374 of 1997). ... Respondents

ALONG WITH

CRIMINAL APPEAL NO.755 OF 1998

Shamrao Jaywant Pawar, aged about 27 years, Occu.: Agriculture, residing at Pawar Mala, Panchavati, Nasik. ... Appellant

Versus

State of Maharashtra (At the instance of Panchavati Police Station vide C.R. No.374 of 1998). ... Respondents

Mr. Prakash Naik for the appellants.

Mr. F.R. Shaikh, A.P.P. for the respondents-State.

CORAM : SMT. RANJANA DESAI & D.G. KARNIK, JJ.

DATED : 7TH MARCH, 2006.

ORAL JUDGMENT:- [Per (Smt.) Ranjana Desai, J.]

1. In both these appeals, the judgment and order dated 9/9/1998 passed by the IVth Additional Sessions Judge, Nasik in Sessions Case No.37 of 1998 is challenged. Criminal Appeal No.735 of 1998 is filed by original accused 2 and 3 and Criminal Appeal No.755 of 1998 is filed by original accused 1. For the sake of convenience, we shall refer to the appellants as per their status in the sessions case.

2. The accused were charged under section 498-A and section 302 read with section 34 of the Indian Penal Code (for short, "the Code") on the allegation that they subjected deceased Kalpana, the wife of accused 1 to cruelty and that they committed murder of said Kalpana and her daughter Sonali by setting them on fire, in furtherance of common intention.

3. We may give gist of the facts of the case. Deceased Kalpana and accused 1 Shamrao were married on 29/5/1992. Deceased Sonali was their daughter. Accused 2 Pandit is the elder brother of accused 1 and, accused 3 Krushnabai is their mother. According to the prosecution, after marriage, initially for a period of two years, deceased Kalpana was happy. Thereafter, the accused started ill-treating her. Accused 2 and 3 instigated accused 1 to assault deceased Kalpana. They used to demand money. They had asked

deceased Kalpana to bring Rs.25,000/- from her father. Deceased Kalpana used to complain to her parents regarding the cruelty meted out to her by the accused. She used to send letters to her parents complaining about the said cruelty. On account of this discord, deceased Kalpana had to leave her marital home and go to her parents' home. Admittedly, she stayed with her parents for three years. It appears that thereafter, deceased Kalpana initiated proceedings under section 498-A of the Code against the accused. Those proceedings were pending. Thereafter, there was a compromise between the parties and an agreement dated 21/5/1997 [Ex-27] was prepared. After this compromise, accused 1 and 2 took Kalpana and daughter Sonali to their house. Accused 1 was residing with his wife - deceased Kalpana, daughter Sonali and his mother accused 3 in a separate house. Accused 2 was residing in another house.

4. According to the prosecution, just before the incident, the brother of the deceased, PW-5 - Jitendra had visited deceased Kalpana's house to take her to his house for Diwali. At that time, accused 1 Shamrao sent Kalpana with Jitendra to his house after taking an undertaking from him that he would bring her back on 6/11/1997. The said undertaking [Ex-52] is on record. Accordingly, after Diwali, on 6/11/1997, Kalpana was sent back to her marital home.

5. On the day of the incident i.e. on 3/12/1997 in the night at about 0.30 hours, according to the prosecution, accused 1 poured kerosene on the

person of deceased Kalpana and set her on fire. The accused pushed deceased Sonali on the person of deceased Kalpana when she was burning. Both sustained 100% burns. They were shifted by the accused to Civil Hospital, Nasik. According to the prosecution, at that time, accused 2 Pandit phoned PW-6 - Gulabrao, who is the paternal uncle of deceased Kalpana and informed him that Kalpana had set herself on fire; she and her daughter had sustained burns and, therefore, they were admitted in the hospital. On receiving this information, PW-4 - Anandrao, PW-6 - Gulabrao and others went to the Civil Hospital, Nasik. When deceased Kalpana and daughter Sonali were taken to the Civil Hospital, PW-2 - Dr. Ashtaputre was on duty. He contacted the police. PW-7 - PSI Sapkale visited the hospital. PW-7 - PSI Sapkale recorded the statement of deceased Kalpana, which is at Ex-39 after ascertaining from PW-2 - Dr. Ashtaputre that she was conscious and in a fit condition to make a statement. In this statement, the deceased inter alia stated that on 2/12/1997 at night at about 11.00 p.m. her mother-in-law and her brother-in-law Pandit told her husband to pour kerosene on her and set her on fire. Accordingly, her husband poured kerosene on her and set her on fire and pushed her daughter Sonali on her. Due to this they sustained burns. That statement was treated as an F.I.R. and an offence under section 307 read with section 34 of the Code came to be recorded.

6. Thereafter, PW-7 - PSI Sapkale called the Special Judicial Magistrate PW-3 - Chavan. PW-3 - Chavan verified the condition of Kalpana. PW-2 - Dr. Ashtaputre certified that Kalpana was conscious and in a fit condition to make

dying declaration. The dying declaration of deceased Kalpana [Ex-40] came to be recorded in the presence of PW-2 - Dr. Ashtaputre. In this dying declaration, deceased Kalpana stated that on the instigation of her mother-in-law accused 3 - Krushnabai, her husband accused 1 poured kerosene on her person and set her on fire; their daughter Sonali was pushed on her person and she also sustained burns; nobody extinguished the fire; her nephew put quilt on her person and after extinguishing fire, took her to the dispensary. Accused came to be arrested at 3.00 a.m. on the same day. Deceased Kalpana as well as her daughter Sonali died in the hospital on 3/12/1997. After their death, the offence was converted into one under section 302 read with section 34 of the Code. After completion of investigation, the accused came to be charged as aforesaid.

7. At the trial, the prosecution examined as many as seven witnesses. The prosecution examined PW-2 Dr. Ashtaputre, who had done the post-mortem on the deceased. The prosecution examined Special Judicial Magistrate PW-3 - Chavan, who had recorded the dying declaration [Ex-40]. The prosecution also examined PW-4 - Anandrao, PW-5 - Jitendra and PW-6 Gulabrao in connection with the allegation of cruelty meted out to the deceased. PW-7 - PSI Sapkale attached to Panchavati Police Station gave details of investigation.

8. The accused denied the case of the prosecution. They claimed to be innocent. According to the accused, deceased Kalpana used to hate her

husband accused 1 - Shamrao. She had initiated criminal proceedings against him. There was a compromise. According to accused 1, on the fateful night, when he touched his wife, she slapped him. He, therefore, opened the door of the house and went to his brother to inform about the conduct of his wife. In the meanwhile, deceased Kalpana set herself on fire after pouring kerosene on her person and on the person of her daughter Sonali. He returned along with his brother - accused 2 and mother -– accused 3 to his house. He asked deceased Kalpana to open the door. She opened the door and came out in a burnt condition. The accused did not lead any evidence in support of their case.

9. After perusing the evidence on record, the learned sessions judge convicted accused 1 under section 302 of the Code and sentenced him to suffer R.I. for life and to pay a fine of Rs.1,000/-, in default, to undergo further R.I. for three months. Accused 1 to 3 were convicted for the offence punishable under section 498-A read with section 34 of the Code and were sentenced to suffer R.I. for three years and to pay a find of Rs.1,000/- each, and in default, they were to undergo further R.I. for three months. The substantive sentences were ordered to run concurrently. Being aggrieved by this judgment and order, the accused have preferred the instant appeals.

10. We have heard, at some length, Mr. Naik, learned counsel appearing for the accused. We have also heard Mr. Shaikh, learned A.P.P. appearing for the State. With the assistance of the learned counsel, we have gone

through the evidence and the record.

11. The prosecution story basically rests on dying declarations. Mr. Naik, learned counsel for the appellants contended that there is a variance between the dying declaration [Ex-39] recorded by PW-7 - PSI Sapkale, which is treated as F.I.R. and the dying declaration [Ex-40], which is recorded by the Special Judicial Magistrate PW-3 - Chavan. The learned counsel pointed out that whereas in the dying declaration [Ex-39] it is recorded that at the instigation of her mother-in-law and the brother-in-law, the husband of the deceased poured kerosene on her and set her on fire and pushed daughter Sonali towards her, in dying declaration [Ex-40], which is recorded by the Special Judicial Magistrate PW-3 - Chavan, though the deceased has stated that the mother-in-law asked her husband to pour kerosene on her and her husband poured kerosene on her and set her on fire, there is no reference to her brother-in-law accused 2 - Pandit having instigated her husband to pour kerosene on her. In fact, there is no clear indication in Ex-40 that the brother-in-law was there at all. The learned counsel submitted that from these two dying declarations [Ex-39 and Ex-40], it is also not clear whether the daughter was pushed by accused 1. He submitted that though conviction can rest on an uncorroborated dying declaration, the court has to be circumspect while accepting the dying declaration as a piece of evidence. The dying declaration has to be strictly construed. In case of plurality of dying declarations, they have to be consistent. The learned counsel urged that variance has made the dying declarations suspect.

12. He further submitted that admittedly, the deceased had suffered 100% burn injuries. In the nature of things, therefore, it is impossible for the deceased to make any dying declaration. He drew our attention to the post-mortem notes and contended that in view of the fact that PW-2 - Dr. Ashtaputre has clearly indicated that the deceased died due to shock due to deep and extensive burns, the prosecution story that she made dying declarations must be discarded.

13. Mr. Naik, learned counsel further contended that the allegation that accused 2 and 3 treated deceased Kalpana with cruelty, is not established at all. He drew our attention to the evidence of PW-4 - Anandrao, PW-5 - Jitendra and PW-6 - Gulabrao and submitted that there are material omissions in the evidence of these witnesses. The case that Rs.25,000/- was demanded by the accused is not established, beyond doubt. In the circumstances, urged Mr. Naik the conviction and sentence awarded for the offence under section 498-A must be set aside.

14. Mr. Shaikh, learned A.P.P., on the other hand, submitted that the prosecution has proved its case beyond reasonable doubt. He submitted that so far as cruelty is concerned, admittedly the relations between the deceased and the accused were strained. This is evidenced by the agreement, which is on record. He submitted that there are letters of the deceased on record, which also indicate that cruelty was meted out to the deceased. Dying

declarations of the deceased are a clinching piece of evidence establishing the guilt of the accused. In the circumstances, according to learned A.P.P., no interference is necessary with the impugned order.

15. So far as the prosecution story that accused 1 poured kerosene on the deceased and set her on fire is concerned, in our opinion, it is borne out by the dying declaration [Ex-40] recorded by the Special Judicial Magistrate PW-3 Chavan. It is also corroborated by the dying declaration of the deceased recorded by PW-7 - PSI Sapkal [Ex-39].

16. We may first refer to the evidence of PW-7 - PSI Sapkale of Panchavati police station. He has stated that on 2/12/1997, he was on patrolling duty. He received information on wireless about a woman having been burnt. He went to Pawar Mala in the mobile van. He was told that a woman and her daughter, who had sustained burns were shifted to Civil Hospital, Nasik. Thereafter, he went to Civil Hospital, Nasik. He found that deceased Kalpana was talking. He contacted PW-2 - Dr. Ashtaputre. PW-2 - Dr. Ashtaputre told him that deceased Kalpana was conscious and in a fit state of mind to give statement. He recorded her statement. He read it over to her and she put her thumb impression on it admitting it to be correct. The said statement was treated as complaint [Ex-39] on the basis of which investigation was started. PW-7 - PSI Sapkale has been cross-examined, at length. However, on this aspect, PW-7 - PSI Sapkale is firm in his cross-examination. We have perused Ex-39. We find that PW-2 - Dr. Ashtaputre has certified that

deceased Kalpana was conscious and in a fit condition to give statement. In this statement, deceased Kalpana had stated that her mother-in-law and her brother-in-law i.e. accused 2 and 3 told her husband to pour kerosene on her and, her husband poured kerosene on her and set her on fire and pushed daughter Sonali towards her. She has further stated that nobody tried to extinguish the fire. She fell down. Her nephew put quilt on her and, thereafter, she was taken to the hospital. We find no difficulty in placing reliance on this statement as regards the main plank of the prosecution story i.e. accused 1 poured kerosene on her and set her on fire and pushed Sonali towards her. There is consistency between Ex-39 and Ex-40, which are respectively the dying declarations recorded by PW-7 PSI Sapkale and PW-3 - Chavan, the Special Judicial Magistrate on this aspect. We have, therefore, no hesitation in coming to the conclusion that accused 1 poured kerosene on the deceased and set her on fire and pushed daughter Sonali towards her.

17. That takes us to the evidence of the Special Judicial Magistrate PW-3 - Chavan. According to PW-3 - Chavan, on 2/12/1997 at 11.40 p.m. he received yadi from police station, Panchavati, requesting him to record the dying declaration of deceased Kalpana. At 11.45 p.m., he went to the hospital and contacted PW-2 - Dr. Ashtaputre to verify the condition of deceased Kalpana. PW-2 - Dr. Ashtaputre certified that she is fully conscious and in a fit condition to give statement. Accordingly, PW-2 - Dr. Ashtaputre made endorsement on the form, on which the statement was to be recorded by PW-7 - PSI Sapkale and the statement was recorded in `question and answer

form'. After recording the statement, he read it over to the deceased. She admitted it to be correct and then put her thumb impression at the bottom of the statement. He also signed at the bottom of the statement. PW-2 - Dr. Ashtaputre again examined her and certified that she was conscious and able to talk. Accordingly, PW-2 - Dr. Ashtaputre made endorsement to that effect. The dying declaration [Ex-40] is on record. We have perused it. We find that PW-2 - Dr. Ashtaputre has made endorsement on it as regards the physical condition of deceased Kalpana. PW-2 - Dr. Ashtaputre found her to be in fit mental and physical condition to make a statement. In the cross-examination of PW-3 - Chavan, nothing has been elicited which can persuade us to hold that he is making any false claim. PW-3 - Chavan is an independent witness, who has no axe to grind against the accused. There is no reason for him to make false statement against the accused. We believe this witness. In the dying declaration recorded by PW-3 - Chavan, the deceased has clearly stated that her husband poured kerosene on her and set her on fire. He pushed daughter Sonali towards her and Sonali also received burn injuries. She has further stated that nobody tried to extinguish the fire. Her nephew put quilt on her person and extinguished the fire and she was then taken to the hospital. From this dying declaration, in our opinion, one fact is clearly established that accused 1 poured kerosene on deceased Kalpana, set her on fire and pushed daughter Sonali to her.

18. It is pertinent to note that though in the statement recorded by PW-7 - PSI Sapkale, the deceased had referred to her mother-in-law and brother-in-law having instigated her husband, brother-in-law's instigation is

conspicuously absent in the dying declaration [Ex-40] recorded by PW-3 - Chavan, the Special Judicial Magistrate. Though there is reference to accused 2 and 3 in both the dying declarations, in the dying declaration [Ex-40] there is no clear reference that accused 3 asked accused 1 to pour kerosene on the deceased. In both the dying declarations overt act is attributed to only accused 1. Therefore, involvement of accused 2 and 3 is not established beyond doubt. We, therefore, concur with the learned Sessions Judge that denial of paternity of Sonali by accused 1 could be the motive and only accused 1 must be held guilty for the offence punishable under section 302 of the Code.

19. The prosecution has examined PW-1 – Laxman Bomble. PW-1 - Bomble was working in the field of son of accused 2. Laxman Bomble had stated that at 11.00 p.m. in the night in question, he was in the cattle shed, which is adjacent to the house of the accused. Deceased Kalpana, her daughter Sonali and accused 1 Shamrao were in the house. Accused 3 was in the house of accused 2. According to this witness, accused 1 went to the room where his mother had slept asking his mother to get up and see what his wife is doing. Thereafter, accused 1 and 3 went back towards the room of accused 1 Shamrao. They pushed the door. The door was chained from inside. Accused 3 asked deceased Kalpana to open the door. Deceased Kalpana opened the door. She came outside the room in flames. She went upto the room of accused 2 - Panditrao and came back and fell down in front of her room. This witness has denied that the deceased told him that her

husband, his brother and her mother-in-law set her on fire. Thus this witness turned hostile and was cross-examined by the public prosecutor.

20. Mr. Naik, learned counsel for the accused strongly relied on this witness. He contended that this witness has stated that the door of the house was chained from inside and it is only when accused 3 asked the deceased to open the door, that she opened the door and came out and, therefore, the case of suicide is clearly made out. The learned counsel contended that so far as this statement is concerned, the prosecution has not brought on record any contradiction. He submitted that to this extent, therefore, the evidence of PW-1 must be accepted as depicting the prosecution story. He submitted that if the door was chained from inside, then there is no question of the accused pouring kerosene on the deceased and setting the deceased on fire. We are not impressed by this submission. The case of suicide is not probabalised. This witness is won over and, hence, he is trying to favour the defence. We are of the opinion that the trial court has rightly disbelieved this witness.

21. It is pertinent to note that PW-6 - Gulabrao has in his evidence stated that accused 2 - Pandit phoned him in the night of 2/12/1997 and 3/12/1997 and informed him that deceased Kalpana had set herself and her daughter on fire after pouring kerosene on herself and on her daughter Sonali after chaining the door of the house from inside and, thereafter, they removed the deceased and her daughter to the hospital by breaking open the door. PW-4 - Anandrao, the father of the deceased has also corroborated this version. He

has stated that his brother PW-6 Gulabrao had received a phone call that his daughter Kalpana had after closing the door from inside set herself and her daughter on fire after pouring kerosene on their persons and that they were removed from the room and shifted to Civil Hospital, Nasik after breaking open the room. It is pertinent to note that these statements are not shaken in the cross-examination. It is necessary, at this stage, to refer to the panchnama. The panchnama [Ex-23] does not indicate that the latch of the house of accused 1 was broken. There appears to be a positive statement that the latch was intact. Therefore, it is clear that PW-1 - Bomble has falsely stated that the room was latched from inside and the deceased opened it and the learned Sessions Judge has rightly called him an unreliable witness. We are also of the opinion that the accused tried to cook up a false story that the door was latched from inside by the deceased and that it had to be broken open. The defence version that the deceased committed suicide is not probablised.

22. We are, however, of the opinion that the prosecution has failed to prove that the accused are guilty of offence punishable under section 498-A read with section 34 of the Code. In this connection, the prosecution has basically relied upon three witnesses. The first witness PW-4 –- Anandrao, the father of the deceased had stated that whenever the deceased used to visit his house, she used to tell him that on the instigation of her mother-in-law and her brother-in-law i.e. accused 2 and accused 3, her husband used to assault her on account of demand of money. He has further stated that he used to

request the accused not to ill-treat his daughter as he was unable to pay money. He has referred to certain letters which his daughter had sent him complaining about the ill-treatment and harassment by the accused. The said letters are at Ex-48 to Ex-51. According to him, when accused 2 and accused 3 had denied the paternity of Sonali, the daughter of the deceased, the deceased and her daughter had to leave the marital home and stay with him for about three years. He has also referred to compromise (Ex-27). He has stated that after the compromise, the deceased was sent to the marital home. She stayed there upto Diwali festival of 1997. Prior to Diwali festival, on 2/11/1997 he had sent his son - Jitendra to the house of the accused to call the deceased home for Diwali. According to him, on 2/11/1997 when Jitendra went to the house of the accused, accused Krushnabai asked him as to whether he had brought Rs.25,000/- and further told him that he should tell accused 2 and then take the deceased home. The deceased was then sent to his house with Jitendra after obtaining an undertaking in writing that he would bring her back. He has produced the said chit which is at Ex-52. He has further stated that when deceased Kalpana had been to his house for Diwali festival, she told him and his wife that the accused were harassing her and asking her to bring Rs.25,000/- towards dowry.

23. It appears that the deceased was treated well by the accused for a period of three years after marriage. When PW-4 Anandrao was confronted with his statement before the police, he has stated that he cannot say whether

the said portion found in his statement is true or not. It appears that the relations between the two sides were strained after sometime and the deceased had to leave her marital home and go to her father's home and stay there for three years. It is pertinent to note that thereafter the parties entered into a compromise. The compromise was recorded and pursuant to the compromise the deceased went home. We find from this compromise that prosecution under section 498-A of the Code was initiated by the deceased and the deceased had undertaken to withdraw the said prosecution. Though it is true that the relations between the accused and the deceased were strained at some time, we cannot loose sight of the fact that a compromise was arrived at between the two sides and the deceased undertook to withdraw the complaint filed by her under section 498-A of the Code. The letters which are on record have been perused by us. Undoubtedly, the deceased had made some complaints about the conduct of the accused but there is no complaint that the accused were demanding Rs.25,000/- as dowry from her in any of these letters and these letters are sent prior to the compromise. In the cross-examination of PW-4 Anandrao, an omission has been brought on record as regards the statement made by him that accused had denied paternity of her daughter and therefore there was a quarrel between them and the accused and the accused had asked him to take the daughter to his house. Omission has also been brought on record in the cross-examination as regards the deceased telling him at the time of Diwali that the accused were demanding Rs.25,000/- towards dowry. The demand of Rs.25,000/-, therefore, is not supported by the evidence of this witness.

24. PW-5 Jitendra, the brother of the deceased has stated that on 2/11/1997 he had gone to Nasik to call his sister to his house for Diwali. At that time, accused Panditrao asked him whether he had brought Rs.25,000/-. He asked him to give undertaking in writing that he would bring his sister back on 6/11/1997. According to him, to that effect he gave a writing which is the chit (Ex-52). He has further stated that at that time, accused Panditrao and his mother abused the deceased and threatened her. This witness has not stated that while the deceased was staying with the accused, the accused used to ill-treated her. No instances of ill-treatment have been given by him. Chit (Ex-52) by itself does not indicate any instance of cruelty.

25. The last witness on this aspect is PW-6 - Gulabrao, the uncle of the deceased. He has stated that the deceased used to complain about the ill-treatment given to her by the accused because she was not bringing money from her father. He has also spoken about the compromise. According to him on 14/11/1997 he had visited the house of the accused. At that time, accused Krushnabai asked him as to whether amount of Rs.25,000/- was brought by him as dowry. When he expressed his inability to pay, she started abusing him and PW-4 Anandrao. According to him, thereafter, the deceased came there and told him that accused 2 used to drink liquor and harass her. These allegations are general allegations. No specific instances of cruelty have been given by this witness. In fact, none of the witnesses have given

any specific instances of cruelty. It is pertinent to note that PW-4 Anandrao has admitted that the accused had spent for marriage and, therefore, Rs.5,000/- was given to the accused in that connection at the time of marriage. Demand of Rs.25,000/- in our opinion, is not established. It is difficult to believe the prosecution witness, who are close relations of the deceased and hold that the deceased was being harassed by the accused for Rs.25,000/-. In our opinion, charge under section 498-A read with section 34 of the Code is not proved and, hence, the conviction and sentence of accused on that count will have to be set aside. Hence, the following order :

O R D E R

"The impugned judgment and order dated 9/9/1998 passed by the IVth Additional Sessions Judge, Nasik in Sessions Case No.37 of 1998 convicting accused 1 - Shamrao Jaywant Pawar of the offence punishable under section 302 of the Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- in default to undergo further rigorous imprisonment for three months is confirmed.

Conviction and sentence of accused 1 – - Shamrao Jaywant Pawar, accused 2 -– Pandit Jaywant Pawar and accused 3 - Krushnabai Jaywant Pawar under section 498-A read with section 34 of the Code is quashed and set aside. We are informed that accused 2 and 3 are on bail. Their bail bonds stand cancelled.

In the circumstances, Criminal Appeal No.735 of 1998 stands allowed and Criminal Appeal No.755 of 1998 stands disposed of in the aforestated terms.

[SMT. RANJANA DESAI, J.]

[D.G. KARNIK, J.]